

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

76-4174

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM B. STRONG and CONSTANCE L.
STRONG, et al.,

Petitioners-Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

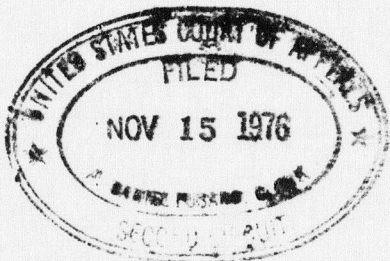
CIVIL APPEAL

Docket No.
76-4174

APPEAL FROM DECISION OF UNITED STATES TAX COURT

REPLY BRIEF FOR APPELLANTS

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In the Government's Brief at page 31 it is contended that the petitioners-appellants have first raised an argument in their Brief that ought not to be heard on Appeal. The Government is referring to the contention of the petitioners-appellants that, as to Parcel 1 with respect to which construction was completed and the permanent mortgage executed by January 15, 1969, the partnership be held to be the real owner for federal income tax purposes so that the benefit of accelerated depreciation is enjoyed by the partnership as the "first user" of the property (as well as any other benefits and burdens that would flow from such holding).

¹ Cases of the following petitioners are consolidated herewith: Fred W. Pollman and Agnes K. Pollman, docket No. 2174-74; Paul W. Henninger and Mabel E. Henninger, docket No. 2175-74; Victor L. Alger and Coral E. Alger, docket No. 2206-74; Frederic B. Adler and Helen P. Adler, docket No. 2207-74; and Colburn A. Jones and Patricia L. Jones, docket No. 2208-74.

The Government's contention that this argument was not previously raised by petitioners-appellants is in error, as shown by the following facts:

1. The Petition in the United States Tax Court on behalf of each taxpayer contended that at all times the partnership was the owner of the apartment project and it was never conceded that the corporation was the owner for tax purposes at any time. Therefore, given the basic premise on which the taxpayers petitioned to the Tax Court, necessarily the status of "first user" of the property must have vested in the partnership and therefore the benefits of accelerated depreciation would have inured to the partnership. It was not necessary to spell out in the Tax Court Petition specific reliance on the Bolger² case as it was encompassed within the taxpayers' theory of the case.

2. The specific issue was discussed at the opening of the trial in the Tax Court in a colloquy between Judge Tannenwald and Robert V. Hunter, attorney for the petitioners (although the Transcript in the Tax Court erroneously refers (beginning on page 3) to "Mr. Baker" while it is evident from the beginning of the colloquy on page 2 that it is Mr. Hunter who is addressing the Court; the answers by "Mr. Baker" to the Court's comments or questions further make it evident that it

² David F. Bolger v. Commissioner, 59 T.C. 760, acq. I.R.B. 1976-20,6.

was not Mr. Baker who was speaking but rather Mr. Hunter -- which error in the Transcript continued to page 7).

On page 6 of the Transcript in answer to a question by the Court, Mr. Hunter makes it clear that if the Tax Court were to hold that the corporation was a viable entity for tax purposes, then in such event Mr. Hunter would argue on behalf of the petitioners that "... once the property had been conveyed to the partnership from the corporation, that certainly the partnership, from that point, would be entitled to depreciation".

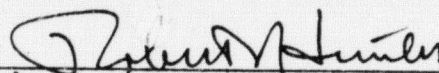
This answer and the comments immediately before and following it make it quite clear that this issue, raised by the Bolger case, was before the Court (althouth not dealt with in the Opinion of the Tax Court); and

3. Lastly, the taxpayers in their Brief to the Tax Court, at page 42, in discussing the Bolger case specifically raised the issues as to the right of the taxpayers to deduct interest during construction and to the partnership's status as "first user" for depreciation purposes (both of these issues being directly dependent upon the resolution of the question as to when the corporation ceased to be the owner, assuming that the Government's position were upheld that the corporation is to be recognized as an entity for tax purposes).

The petitioners-appellants therefore respectfully must disagree with the position expressed by the Government at page 31 of its Brief. This extremely important issue is properly before this Court and should be dealt with on this Appeal.

November 12, 1976

Respectfully Submitted,



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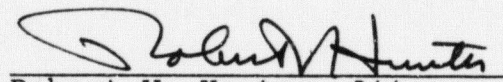
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CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four (4) copies thereof on this 12th day of November, 1976, in an envelope, with postage prepaid, properly addressed to him as follows:

Gilbert E. Andrews, Chief
Appellate Section
U. S. Department of Justice
Washington, D. C. 20530


Robert V. Hunter, Attorney